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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

12 United States of America,
13 Plaintiff,

14 vs.

15 Lonnie Ray Swartz,
16 Defendant.
17

CR-15-1723-TUC-RCC(DTF)

**UNOPPOSED GOVERNMENT'S
MOTION FOR A
PROTECTIVE ORDER**

18 Now comes the United States of America, by and through its undersigned counsel,
19 and hereby respectfully moves this Honorable Court, pursuant to Federal Rules of
20 Criminal Procedure, Rules 6(e) and 16(d)(1), for a protective order encompassing the
21 government's disclosure to the defendant. As grounds in support thereof we state as
22 follows.

23 1. On September 28, 2015, the defendant was indicted by a federal grand jury
24 in Tucson, Arizona, on the charge of second degree murder arising out of the shooting
25 death of J. A., a minor, on October 10, 2012.

26 2. Prior to the indictment, Araceli Rodriguez, the mother of J. A., filed a Civil
27 Complaint in the U.S. District Court on July 29, 2014, against John Does 1-10, Agents of
28 U.S. Border Patrol, and John Does 11-20, Officers of U.S. Customs and Border

1 Protection, seeking damages for the murder of her son. See, *Araceli Rodriguez v. John*
2 *Does 1-10*, Case No. 14-cv-02251-TUC-RCC. Lonnie Ray Swartz, the defendant in the
3 criminal case, was subsequently identified as the Border Patrol Agent responsible for the
4 death of J.A. and the name of the civil Complaint was changed to *Araceli Rodriguez v.*
5 *Lonnie Swartz*.

6 3. Sean Chapman, Esq., represents Lonnie Ray Swartz in both cases.

7 4. The government is required to disclose to the defendant in the criminal case
8 witness testimony before the grand jury, other witness statements, documents,
9 photographs, papers, books, and tangible objects, whether obtained by grand jury
10 subpoena or otherwise, reports of scientific examinations and tests, the identification of
11 potential trial expert witnesses, their qualifications, and a written summary of their
12 testimony, to the extent said material i) falls within Federal Rules of Criminal Procedure
13 Rules 6, 16(a), and 26.2, and/or the Jencks Act, ii) constitutes *Brady* exculpatory
14 evidence and/or *Giglio* witness impeachment evidence, iii) and/or disclosure is otherwise
15 required by the Constitution.

16 5. The government's disclosure in criminal cases is normally not a matter of
17 public record until if and when it is admitted at a pretrial court hearing and/or trial.
18 Additionally, grand jury material is subject to very strict limitations on disclosure
19 pursuant to Federal Rules of Criminal Procedure, Rule 6(e), in order to protect the
20 integrity and secrecy of the grand jury process.

21 6. The government's disclosure will surpass 5,000 pages of documents. It will
22 include among other items: i) statements and/or reports of interviews and grand jury
23 testimony of the Border Patrol Agents and Nogales Police Department Officers who were
24 present during the shooting death of J.A.; ii) reports of interviews of J.A.'s family
25 members and friends; iii) numerous documents including records received through grand
26 jury subpoenas; iv) statements and grand jury testimony of many other witnesses and
27 individuals; v) numerous crime scene photographs including several graphic photographs
28 of J.A. after he was shot to death; vi) pre-autopsy photographs of an unclothed J.A.,

1 depicting his bullet wounds; vii) numerous government agent reports of investigation;
2 and xiii) employment, personal, military, and confidential records pertaining to the
3 defendant. It will also include at least two video recordings. The government's
4 disclosure, in short, will lay out in full detail the evidence surrounding the shooting death
5 of J.A. It will also disclose confidential and personal information concerning potential
6 witnesses that may be protected by the Privacy Act.

7 7. Disclosure of this evidence to Sean Chapman, however, presents a dilemma
8 with serious potential adverse consequences to the criminal case. Receipt of the above
9 referenced evidence from the government in the criminal case will subject Mr. Chapman
10 to subsequent requests for disclosure of this evidence by the plaintiff in the civil case,
11 *Araceli Rodriguez v. Lonnie Swartz*. Mr. Chapman is in the unique position of defending
12 Mr. Swartz in two different forums involving similar claims of responsibility based on
13 identical facts.

14 8. The Federal Rules of Civil Procedure which govern the civil case affords
15 the litigants to make broad requests for discovery on opposing parties – requests that
16 often go beyond what is permitted in federal criminal cases. See, for instance, Federal
17 Rules of Civil Procedure, Rule 26 (required disclosure); Rule 34 (production of
18 documents).

19 9. The Federal Rules of Civil Procedure do not restrict the dissemination of
20 testimony, documents, tangible objects, etc. which come into possession of litigants
21 during pretrial discovery. Mr. Chapman would seemingly be obligated to produce all of
22 the government's disclosure in the criminal case to the plaintiff in the civil case or face
23 sanctions. Thus, the government's criminal disclosure – the entirety of its case against
24 Mr. Swartz – would likely enter the public domain and be subject to media dissemination
25 in Tucson and around the Country.

26 10. This public disclosure would violate the federal grand jury secrecy
27 requirements and result in an unprecedented examination of the grand jury's work
28 leading to the indictment.

1 11. Public disclosure of this evidence moreover would substantially prejudice
2 both the government's and the defendant's right to a fair and unbiased jury in the
3 criminal trial – jurors who cannot help but be exposed pretrial to the facts, testimony,
4 photographs, etc. of the case published in the media. This is an explosive case which has
5 attracted national media attention since J.A. was shot to death. It is one of the few
6 prosecutions of a U.S. Border Patrol Agent for a cross-Border shooting of a Mexican
7 citizen. It has spurred a national debate on the use of force in these situations and when
8 the federal government should hold Border Patrol Agents accountable to the criminal
9 justice system. Both parties in this case want a jury to decide the issue of guilt or
10 innocence free of prior contamination by media stories and opinions based on pretrial
11 disclosure of the evidence.

12 12. Federal Rules of Criminal Procedure, Rule 6(e) expressly limits the
13 instances when grand jury material may be disclosed by the government. Rule 6(e) also
14 implicitly vests the Court with the supervisory powers to limit the disclosure of grand
15 jury material to insure the integrity of the grand jury process. *See Douglas Oil Co. of Cal.*
16 *V. Petro Stops Northwest*, 441 U.S. 211, 218-221 (1979). Rule 16(d) expressly vests the
17 Court with the power to “at any time . . . for good cause, deny, *restrict*, or defer discovery
18 or inspection (of discoverable materials), or *grant other appropriate relief*.” (emphasis
19 added). The Court may issue protective orders pursuant to that power. *See United States*
20 *v. Feeney*, 641 F. 2d 821, 824 (10th Cir. 1981) (protective order can issue to preclude
21 disclosure of allegedly privileged material in a criminal case); *United States v. Barbeito*,
22 2009 WL 3645063 (S.D.W.Va. 2009) (“appropriate... to employ Rule 16(d) protective
23 orders to curtail the public dissemination of sensitive discovery materials that my
24 endanger witnesses or informants” and “the due administration of justice.”)

25 13. For the above and foregoing reasons, the government respectfully moves
26 this Honorable Court to enter a protective order in the criminal case. This order would
27 bar Mr. Chapman and Mr. Swartz from disseminating any government disclosure to any
28 third party unless disclosure is reasonably necessary to defend against the charge in the

1 indictment. Both parties would have the right to seek a modification of the protective
2 order.

3 14. Mr. Chapman, on his own behalf and that of Mr. Swartz, does not oppose
4 this motion for a protective order as indicated below.

5 WHEREFORE for the above and foregoing reasons, the United States of America
6 respectfully moves this Honorable Court to grant this motion.

7 Respectfully submitted on this 23rd day of October, 2013.

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9 JOHN S. LEONARDO
United States Attorney
District of Arizona

10 *s/Wallace H. Kleindienst*

11 Wallace H. Kleindienst
12 Assistant U.S. Attorney

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14 SEEN AND AGREED

15 *s/Sean Chapman*

16 Sean Chapman
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